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No. 09-545

Supreme Court, U.S.
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In The
Supreme Court of the United States

JAMES KEENAN and JUDY KEENAN,

Petitioners,

v.

ROSS PYLE, JEFFREY ISAACS and PROCOPIO, CORY, HARGREAVES & SAVITCH LLP,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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Respondents Ross M. Pyle ("Trustee"), liquidating trustee for the reorganized bankruptcy estate of James W. Keenan dba Data Property Services ("Estate") and Procopio, Cory, Hargreaves & Savitch LLP and Jeffrey Isaacs (collectively "Trustee's Counsel") (Trustee and Trustee's Counsel are collectively "Respondents") respectfully submit this Brief in Opposition to the Petition for Writ of Certiorari ("Petition") filed by Petitioners James W. Keenan ("Debtor"), the debtor in the underlying bankruptcy case, and his wife Judy Keenan (collectively "Petitioners").

INTRODUCTION

Petitioners have presented no "compelling reasons" to grant their Petition. *See* Sup. Ct. R. 10. More specifically, contrary to the Petitioners' argument, the Petitioners' first question presented does not involve an intra-circuit (or any other) conflict; and the Petitioners' second, third and fourth questions presented do not involve issues decided by the Court of Appeals in its Memorandum disposition. On an even more fundamental level, Petitioners have forfeited their right to further appellate review. Petitioners should not be allowed to present questions to this Court when, in the trial court, Petitioners failed to file any response to the Respondents' motion to dismiss the Petitioners' complaint that resulted in the Judgment that preceded the Court of Appeals' Memorandum.

The appeal underlying the Petition is from a Judgment in an adversary proceeding associated with the Debtor's almost 14-year-old Chapter 11 bankruptcy case. Following confirmation of an unopposed liquidating plan of confirmation, all unsecured creditors were paid in late 2000 and the last of the secured creditors was paid in late 2001. However, the Estate has remained open solely for the purposes of either defending the claims Petitioners brought against Respondents or defending the more than 60 (unsuccessful) appellate proceedings prosecuted by Petitioners following Bankruptcy Court orders obtained by the Trustee.

In the underlying adversary proceeding, Petitioners sued the Trustee and Trustee's Counsel (i.e., Respondents) based on actions they allegedly took or did not take in their capacities as a court-appointed trustee and his court-approved counsel. The trial court granted the Respondents' *unopposed* motion to dismiss the complaint and entered Judgment in favor of Respondents. In their Petition, Petitioners raise no issues as to Trustee's Counsel, arguing only that the Court of Appeals erred in affirming the dismissal of the complaint against the Trustee.

At all times after his initial appointment as a Chapter 11 trustee in 1996 and his later appointment as liquidating trustee in 1998, the Trustee sought and obtained appropriate orders and judgments from the Bankruptcy Court authorizing every material action he has taken in his administration of the Estate. Each of those orders and rulings was obtained after

due notice to all interested parties, including Petitioners. Moreover, over the years, Petitioners or entities they controlled have filed three civil lawsuits against Respondents in which Petitioners raised every issue they raised in the underlying adversary proceeding. In short, here Petitioners did nothing more than repackage their previously-litigated claims.

Accordingly, because Petitioners have not met their burden of demonstrating any compelling reasons for the grant of a writ of certiorari, the Petition should be denied.

STATEMENT OF THE CASE

A. The parties

The Debtor is the out-of-possession debtor of a reorganized bankruptcy estate following his 1996 filing of a voluntary Chapter 11 bankruptcy case and the 1998 confirmation of a joint liquidating plan of reorganization ("Plan"). Dkt. 18, pp. 1501-02.[1] Petitioner Judy Keenan is the Debtor's wife. Dkt. 17, p. 1465. Together, Petitioners are the plaintiffs in the

[1] A citation to "Dkt." is to the District Court's docket. District Court docket entries 16-20 and 22 contain the complete 2,515-page record on appeal from the Bankruptcy Court, which was available to the Court of Appeals.

adversary proceeding underlying this appeal. ER 89-103.[2]

The Trustee was originally the Chapter 11 trustee for the Estate; and since confirmation of the Plan in 1998, he has been the duly appointed liquidating trustee of the Estate. Dkt. 18, p. 1502. The Trustee and Trustees' Counsel (Respondents) are the defendants in the adversary proceeding underlying this appeal. ER 89-103.

B. The Petitioners' adversary proceeding

In the bankruptcy case, the Trustee requested and obtained a series of orders providing a procedure to close the (now almost 14-year-old) case. In particular, based on the Debtor's objections to the Trustee's proposed procedure, the Bankruptcy Court (1) required the Trustee to produce for the Debtor's inspection every piece of non-privileged paper in the Trustee's actual or constructive possession pursuant to a detailed regulated schedule, and (2) thereafter established a one-year limitation period for the commencement of any actions or claims against the Trustee or Trustee's Counsel. Dkt. 17, pp. 1467-80; SER 8.[3] The Trustee fully complied with the ordered procedure. Dkt. 18, pp. 1516-21. Petitioners failed to

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[2] A citation to "ER" is to the Excerpts of Record filed in the Court of Appeals.

[3] A citation to "SER" is to the Supplemental Excerpts of Record filed in the Court of Appeals.

review *any* of the tens of thousands of pages of documents that were produced over a period of many months according to the court-ordered schedule. SER 4.

Petitioners initiated their adversary proceeding against Respondents by filing their complaint within days of the court-ordered bar date. ER 89-103.

C. The Trustee's authorization and Bankruptcy Court approvals

The Plan, by which the Trustee became a liquidating trustee, sets forth, *inter alia*, the Trustee's powers and duties. Dkt. 16, pp. 147-48. Pursuant to this authorization, the Trustee has been diligent in obtaining an appropriate order from the Bankruptcy Court approving *every* material action he has taken in his administration of the Estate. Each order found, either expressly or impliedly, that the Trustee's action was both authorized and in the best interests of the Estate. A list of the 167 orders and judgments, grouped together by subject matter based on the Petitioners' allegations in the underlying complaint, was presented to the trial court and is at pages 30-45 of the SER. The material allegations in the Petitioners' complaint are covered by these orders and judgments.

D. The Petitioners' prior unsuccessful collateral attacks

Despite the Plan's authorization and the Bankruptcy Court's express approval of the Trustee's actions, Petitioners have collaterally attacked these prior orders on (at least) two different fronts. Asserting professional improprieties, (1) the Debtor unsuccessfully attempted to compel the return of the Estate to him on four separate occasions[4] (Dkt. 17, pp. 884-1056, 1103-04), and (2) Petitioners filed and unsuccessfully prosecuted to judgment, affirmed on appeal, three civil lawsuits against Respondents (Dkt. 17, pp. 1289-1331, 1367-99). Many of the material allegations in the Petitioners' complaint are also covered by final orders and judgments in these collateral attacks.

E. The Petitioners' unsuccessful appeals of orders and judgments

The orders and judgments described above at parts B-D are only the beginning. Having lost at virtually every juncture in the trial court, Petitioners then engaged in an appellate blitz of these losses. Of the proceedings in which the Trustee has been involved directly, at the time this matter was heard in the Bankruptcy Court there had been at least 54

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[4] Petitioners allege the Estate is "presently worth an estimated $100,000,000." Pet., p. 2. Petitioners are wrong. There is no evidence of this alleged value, and Petitioners have provided no record reference for their gross exaggeration.

separate appellate court proceedings – including 38 to the District Court, 14 to the Ninth Circuit, and two to the state Court of Appeal.[5] *All* have been resolved adversely to Petitioners. SER 19, n. 2; *see also* Dkt. 3.

F. The proceedings before the Petition

In response to the complaint in the adversary proceeding below, as relevant here, Respondents filed a motion to dismiss, or alternatively to grant summary judgment or summary adjudication. Dkt. 16-18, pp. 30-1601. Respondents based their motion on seven distinct grounds: (1) Petitioners failed to comply with the "*Barton* doctrine";[6] (2) quasi-judicial immunity barred all claims; (3) derived judicial immunity barred all claims; (4) the doctrines of res judicata and/or collateral estoppel barred all claims; (5) the applicable statutes of limitations barred all claims; (6) the Trustee did not breach any duty to Petitioners; and (7) Petitioners were not entitled to declaratory relief. Dkt. 16, pp. 30-84.

Despite their participation in ongoing activities in both the adversary proceeding and the bankruptcy case, Petitioners failed to file any response to the

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[5] The total is now 62 separate appellate proceedings: the present Petition in this Court, 43 in the District Court, 16 in the Ninth Circuit, and two in the state Court of Appeal.

[6] No lawsuit may be maintained against a trustee for actions taken in the administration of the estate without leave of the appointing court. *Barton v. Barbour*, 104 U.S. 126, 127-29 (1881).

Respondents' motion. Rather, as recited by the District Court in this appeal, "[o]n the opposition due date, Debtor . . . filed an action against the Bankruptcy Judge in the District Court, alleging the [then 10-year-old] case should be transferred to another judge due to his bias." Pet., p. 8a, n. 3.

The Bankruptcy Court heard and orally granted the motion to dismiss the adversary proceeding. ER 48-72. Noting that "the motion is unopposed at this point", the Bankruptcy Court also reached the merits, denying the motion based on the "*Barton* doctrine" and granting the motion on all of the other six grounds raised. ER 57, 60-65. The court entered a written order, incorporating its oral rulings, and a Judgment of dismissal in favor of Respondents. Pet., Apps. C & D.

Petitioners appealed from the Judgment. Following briefing, the District Court filed a Memorandum Decision and a Judgment, affirming the Bankruptcy Court's Judgment in favor of Respondents. Pet., App. B; ER 4. More specifically, the District Court not only agreed that the lack of an opposition was a sufficient basis on which to affirm, but also agreed with the other six independent grounds given by the Bankruptcy Court for dismissing the case. Pet., App. B.

Petitioners then appealed to the Court of Appeals. Following briefing, the Ninth Circuit – Senior Circuit Judges Wallace and Leavy and Circuit Judge Hawkins – affirmed in a Memorandum, ruling in relevant part that quasi-judicial immunity barred all

of the Petitioners' claims against the Trustee.[7] Pet., App. A, *citing Curry v. Castillo (In re Castillo)*, 297 F.3d 940 (9th Cir. 2002); *Swartz v. KPMG LLP*, 476 F.3d 756, 761 (9th Cir. 2007) (per curiam).

REASONS FOR DENYING THE PETITION

I. Petitioners have forfeited their right to seek review in this Court

Petitioners did not file an opposition to the Respondents' motion to dismiss the Petitioners' complaint in the trial court. ER 57. Accordingly, Petitioners have forfeited the right to seek appellate review of the dismissal of their complaint. *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1061, n. 13 (9th Cir. 2002); *Ratanasen v. California Dep't of Health Servs.*, 11 F.3d 1467, 1473 (9th Cir. 1993) (bankruptcy appeal).

This rule of forfeiture is not intended to be punitive. Rather, it serves (at least) two important purposes: (1) "sound considerations of judicial economy" (*Thomas v. Arn*, 474 U.S. 140, 147 (1985)); and (2) "prevent[ing] a litigant from 'sandbagging' the [trial] judge by failing to object and then appealing" (*Simpson v. Lear Astronics Corp.*, 77 F.3d 1170, 1175

[7] As grounds for affirmance, Respondents briefed and argued all seven bases raised in their original motion to dismiss, although the Ninth Circuit only discussed, and affirmed based on, the Trustee's quasi-judicial immunity.

(9th Cir. 1996)). Both of these concerns are present here: Rather than file written opposition to the motions, thereby advising the Bankruptcy Court of any opposition to the motion, Petitioners instead (1) filed a civil lawsuit against the bankruptcy judge in the District Court, and (2) moved to disqualify the bankruptcy judge who had been presiding over the Debtor's bankruptcy case for more than 10 years in the Bankruptcy Court. *See Keenan v. Pyle (In re Keenan)*, 372 B.R. 496, 498, 500 (Bankr. S.D. Cal. 2007). Petitioners should not be allowed to come to this Court and now raise issues and arguments they intentionally avoided submitting to the trial court.

Moreover, in their 13,845-word opening brief in the Court of Appeals, Petitioners did not mention, let alone argue against, the application of quasi-judicial immunity – an issue that was (1) the Respondents' principal argument in the Bankruptcy Court and District Court, and (2) the principal ruling by both the Bankruptcy Court and District Court. *See* ER 61-62 (Bankruptcy Court's ruling); Pet., 9a (District Court referencing Bankruptcy Court's ruling), 14a-16a (District Court's ruling). Indeed, a review of their opening brief in the Court of Appeals establishes that Petitioners questioned only the application of *derived* judicial immunity, not *quasi*-judicial immunity, even though the two doctrines were treated separately by Respondents in their motion to dismiss (Dkt. 16, pp. 53-55, 55-58), by the Bankruptcy Court in its ruling granting the dismissal (ER 61-62, 62), by Respondents in their appellate brief in the District Court,

and by the District Court in its ruling affirming the Bankruptcy Court (Pet., pp. 14a-16a, 16a-19a).[8] Stated differently, in their Petition under consideration here, for the first time ever Petitioners have questioned the application of quasi-judicial immunity to preclude the claims in their complaint against the Trustee. This omission alone is a sufficient basis on which to deny the Petition, since this Court understandably wants "the benefit of developed arguments on both sides . . . squarely addressing the question" before granting certiorari. *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992).

II. The Ninth Circuit's Memorandum does not conflict with any other decision

Supreme Court Rule 10(a) suggests that one of the "compelling reasons" for granting certiorari is when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." The Memorandum here, however, does not conflict with the decision of any other Court of Appeals, and Petitioners do not argue otherwise. Indeed, Petitioners do not even argue that the Memorandum conflicts with other Ninth Circuit authority. Petitioners argue *only* that two earlier opinions of the

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[8] The Petitioners' argument at the bottom of page 14 of their Petition demonstrates their continued confusion between quasi-judicial immunity and derived judicial immunity.

Ninth Circuit, one from 1983 and one from 2002, appear to be in conflict. Pet., p. 6 ("Thus, the *Cochise* and *Castillo* opinions are in conflict."), *comparing Curry v. Castillo (In re Castillo)*, 297 F.3d 940 (9th Cir. 2002) *with Hall v. Perry (In re Cochise College Park, Inc.)*, 703 F.2d 1339 (9th Cir. 1983) (superseded by statute on other grounds as stated in *In re Palace Quality Servs. Indus.*, 283 B.R. 868, 894 (Bankr. E.D. Mich. 2002)).[9]

Contrary to Petitioners' arguments, however, the Ninth Circuit's *Castillo* and *Cochise College Park* opinions are consistent: A claim may be asserted against a bankruptcy trustee only for a breach of an affirmative duty, not for errors in judgment associated with the trustee's discretionary acts. *Castillo, supra,* 297 F.3d at 947; *Cochise College Park, supra,* 703 F.2d at 1357.[10]

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[9] In their opening brief in the Ninth Circuit, Petitioners did not mention the *Castillo* opinion, and Petitioners cited the *Cochise College Park* opinion only once – and that citation was in an argument not dealing with quasi-judicial immunity. This is despite *Castillo*'s prominence in the Respondents' briefs in the Bankruptcy Court, the District Court and the Court of Appeals, as well as in the rulings by the Bankruptcy Court and the District Court. ER 62; Pet., pp. 14a-16a.

[10] Even assuming (unjustifiably) a conflict between *Castillo* and *Cochise College Park*, the conflict is, at best, an intra-circuit conflict, which is best left to the Ninth Circuit to resolve. Significantly, Petitioners never argued to the Ninth Circuit, either in their merits brief or in a petition for rehearing or rehearing en banc, that *Castillo* and *Cochise* were inconsistent.

Acts performed by judges that relate to the "judicial process" are granted a "sweeping form of immunity." *Forrester v. White*, 484 U.S. 219, 225 (1988). The purposes of judicial immunity are to protect the finality of judgments by discouraging inappropriate collateral attacks and to assure judicial independence by insulating judges from what would otherwise be "vexatious actions prosecuted by disgruntled litigants." *Id.* Even bad faith or malice by a judge while performing judicial duties cannot overcome judicial immunity (*Mireles v. Waco*, 502 U.S. 9, 11 (1991)); and it applies "'however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff'" (*Cleavinger v. Saxner*, 474 U.S. 193, 199-200 (1985)).

As applicable here, the doctrine of "quasi-judicial immunity" extends judicial immunity to nonjudicial officers who are performing official duties functionally comparable to those of judges — i.e., duties that involve the exercise of discretion in resolving disputes. *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435-36 (1993). Thus, those who perform activities closely related to the judicial process also are immune so that they can make quasi-judicial discretionary judgments free from the potential harassment of private litigation. *Imbler v. Pachtman*, 424 U.S. 409, 422-24 (1976). This immunity is based on "'the nature of the function performed, not the identity of the actor who performed it.'" *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993) (prosecutor), *quoting from*

Forrester v. White, supra, 484 U.S. at 229 (state court judge).

As an officer of the court, a bankruptcy trustee performs both administrative and adjudicative functions, with quasi-judicial immunity attaching to "those functions essential to the authoritative adjudication of private rights to the bankruptcy estate." *Castillo, supra*, 297 F.3d at 950-51. Focusing on the "ultimate act," the Ninth Circuit commented that even purely administrative and routine acts requiring no adjudicatory skill are considered part of the judicial function when the activity is discretionary in nature. *Id.* at 952.

In *Castillo*, the Ninth Circuit held that quasi-judicial immunity precluded the debtor's claims against the trustee where the claims were based on the trustee's alleged mishandling of the discretionary acts of scheduling and notification of a plan confirmation hearing. 297 F.3d at 953. Because quasi-judicial immunity attached to the acts in question, the *Castillo* panel expressly declined to "reach [the debtor's] argument that bankruptcy trustees may be liable for negligence." *Id., citing Cochise College Park*, 703 F.2d 1339.

Castillo and *Cochise College Park* are not inconsistent or in conflict: Claims for negligence – even if allowed against trustees – are barred where the claim is based on a discretionary activity, because quasi-judicial immunity applies. In *Cochise College Park*, the Ninth Circuit was not faced with claims that the

bankruptcy trustee had mishandled discretionary judicial acts; the claims involved there alleged breaches of affirmative duties. Indeed, *Cochise College Park* is entirely consistent with *Castillo*: "[A] trustee is not liable in any manner for mistakes in judgment where discretion is allowed." *Cochise College Park, supra*, 703 F.2d at 1357, *citing Mosser v. Darrow*, 341 U.S. 267, 273-74 (1951).

In *Cochise College Park*, after executory contacts had been rejected, the trustee continued to demand, collect and spend the obligors' payments to the estate under the terms of the rejected contracts. 703 F.2d at 1345-46. Those who had made such payments later sued, alleging that the trustee had illegally retained possession of cash payments that were not property of the bankruptcy estate. *Id.* at 1346. Since "the trustee could not reasonably have believed that he was entitled to use the payments in the administration of the estate" (*id.* at 1356), the trustee's acts could not be considered discretionary judicial functions functionally comparable to those of judges (*id.* at 1357).[11] More specifically, once the contracts were rejected, the trustee had an affirmative duty to advise those making payments that the estate was no longer entitled to receive payments under the rejected

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[11] In contrast, to the extent the trustee retained payments received *before* the executory contracts were rejected, the receipt of those funds involved the trustee's discretionary functions related to whether the contracts would be accepted or rejected. 703 F.2d at 1354, 1358. Thus, arguably, claims related to those payments would have been subject to quasi-judicial immunity.

contracts. *Id.* at 1358. Thus, a breach of the trustee's affirmative duties (as opposed to an improper exercise of discretion) "gives rise to a claim for damages for which the trustee is personally liable." *Id.*

The claims in the present case are like those in *Castillo*, not *Cochise College Park*, since the Trustee's acts that form the bases of the Petitioners' complaint here were all discretionary. As the trial court expressly found: "[E]ach of the claims that has been asserted by [Petitioners] against the Trustee . . . arise from the performance of discretionary tasks, resolving disputes, liquidating assets, adjudicating private rights as against the bankruptcy Estate[.]" ER 61. Thus, here, as in *Castillo*, quasi-judicial immunity precludes the Petitioners' claims – even those alleging negligence.

Because the alleged conflict between *Castillo* and *Cochise College Park* asserted by Petitioners is illusory and of their own making, it does not present a compelling reason for granting certiorari.

III. The Petitioners' remaining arguments do not present a basis on which to grant certiorari

The Petitioners' remaining arguments, to the extent Respondents understand them, appear to be based on the statement that "the Ninth Circuit has effectively sanctioned egregious conduct by a court[-]appointed trustee and its attorneys." Pet., p. 8;

see generally id., pp. 8-16. None of what Petitioners present provides a basis on which to grant certiorari.

Petitioners first complain about an allegedly "intolerable situation" related to the closing of the bankruptcy case.[12] Pet., p. 8. In this regard, however, what Petitioners failed to tell this Court is that the only events keeping the case open have been initiated by Petitioners. The last unsecured claim was paid in late 2000, the last secured claim was paid in late 2001, and the Trustee first commenced efforts to close the case in 2002. The Debtor opposed the Trustee's original motion in 2002 for an order in aid of closure of the case; and the Bankruptcy Court agreed with the Debtor and denied the Trustee's motion. The Trustee filed a second motion for an order in aid of closure of the case in mid-2003, which the Bankruptcy Court granted despite opposition by the Debtor; and the Debtor unsuccessfully appealed that order. The Trustee then filed a motion for an order approving the procedures to close the case (as approved in mid-2003), which the Bankruptcy Court granted in part despite opposition by the Debtor; and the Debtor unsuccessfully appealed that order – twice. The Trustee complied with the year-long protocol attendant to closing the case, applying for

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[12] Petitioners make statements concerning dollar values of claims, assets, and fees and administrative expenses related to the Estate. Pet., pp. 8-9. Respondents strenuously disagree with the Petitioners' version of these facts – notably, facts Petitioners have presented without any record references.

and receiving Bankruptcy Court approval at various stages. *See generally* SER 43-44 & related exhibits 147-148, 150-153. The point is: What Petitioners complain of in their Petition all relate either to the confirmed plan of reorganization or to the procedures employed in attempting to close the case – i.e., final orders, most of which Petitioners opposed and from many of which Petitioners appealed.

Petitioners then quote at length from their complaint, ultimately contending that Respondents are "liable for failing to promptly administer the [E]state and pay creditors and for wrongfully refusing to promptly return the residual estate . . . [and] for mismanaging certain [E]state assets, for the diminution to the [E]state from their non-disclosure or concealment of documents, and for other negligent, grossly negligent and fraudulent conduct." Pet. pp. 13, 9-13. Because all of these allegations relate to discretionary acts, the claims associated with them are all barred by the doctrine of quasi-judicial immunity. *See* part II, *supra*. Moreover, as argued by Respondents in the Bankruptcy Court, in the District Court and in the Court of Appeals and as concluded by the Bankruptcy Court and by the District Court, such claims are also barred by the doctrines of derived judicial immunity, res judicata and/or collateral estoppel and the applicable statutes of limitations. ER 62-65 (Bankruptcy Court); Pet., pp. 16a-21a (District Court). Affirming based solely on quasi-judicial immunity, the Court of Appeals declined to reach these alternative issues and arguments in its

Memorandum. Pet., p. 2a. Without the benefit of the Court of Appeals' refinement and resolution of these issues, however, this Court should deny the Petition. *Austin v. United States*, 509 U.S. 602, 622-23 (1993) ("Prudence dictates that we allow the lower courts to consider that question in the first instance.").

CONCLUSION

Because Petitioners have not established any compelling reasons for granting a writ of certiorari, their Petition should be denied.

Respectfully submitted,

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